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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

*Bruton v. Gerber Products Co.*, No. 15-15174

O'SCANNLAIN, Circuit Judge, concurring in part and dissenting in part:

While I join in Parts 1, 2, and 4 of the court's disposition in this case, I must respectfully dissent from Part 3, and from the majority's conclusion that there is a genuine issue of material fact regarding consumer deception in this case. I agree with the district court that the record does not contain sufficient evidence upon which a rational juror could conclude that a reasonable consumer would be deceived as to the quality of Gerber's products based on the challenged statements. I thus would affirm the court's grant of summary judgment on Bruton's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act claims.

I

To prevail on any of these claims, Bruton must be able to prove (among other things) that "a significant portion of the general consuming public" is likely to be deceived by the contested label claims. *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016) (internal quotation marks omitted). Bruton specifically argues that the challenged nutritional statements on Gerber's labels would cause reasonable consumers to be misled about the *quality* of Gerber's products (as compared to nutritionally similar products that do not include such label claims).

In support, she submitted as evidence: (1) the products' labels themselves, (2) her own testimony that *she* was misled about the quality of Gerber's products, and (3) two FDA warning letters regarding the products' labeling.

First, the FDA warning letters do not help Bruton, as they do not address the potential for consumers to be misled about the quality of Gerbers' products. Second, as the district court recognized, Bruton's testimony about her own confusion cannot satisfy the reasonable consumer standard, because "a few isolated examples of actual deception are insufficient" to create a material dispute over the likelihood of general consumer deception. *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1026 (9th Cir. 2008) (internal quotation marks omitted). The majority challenges neither of these conclusions.

II

The majority holds, however, that the very label statements that Bruton challenges themselves supply sufficient evidence to satisfy California's "reasonable consumer" test. To do so, the majority mistakenly relies on *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663 (2006), a case that has little to say about the circumstances before us.

In *Colgan*, the plaintiff alleged that Leatherman deceptively labeled its tools as "Made in U.S.A.," even though "significant parts of the tools"—including parts that were the main reason people bought the tools—were made *outside* the U.S.A. *Id.* at 680 (internal quotation marks omitted). Thus, the court quite understandably reasoned that the label "Made in U.S.A." itself may evidence deception when, in fact, the product was *not* made in the U.S.A. in a meaningful sense. *See id.* at 682–83. This seems straightforward. There is virtually no other way a consumer could read "Made in the U.S.A." but to mean that meant the product was indeed manufactured in the U.S.A, and thus there seems little reason to require additional evidence to confirm that reasonable consumers might have been deceived by such a false assertion.

But this case involves no similar allegation of a false (or even mostly false) factual assertion. To repeat, the question in this case is whether the challenged nutritional statements on Gerber's labels would cause a reasonable consumer to be misled about the *quality* of Gerber's products. Yet the challenged statements themselves say nothing at all about the quality of Gerber's products; they simply report—accurately—certain nutritional features of the products. Bruton does not claim that these statements are false or even misleading about the actual nutritional content of the products (for example that a product labeled "no sugar added" in fact included added sugar). Thus, to carry her burden at this stage, Bruton must provide some evidence that reasonable consumers would see these truthful nutritional statements about Gerber's products and be deceived into thinking such products are somehow better than other products that are the same nutritionally but which did not have the label statements.

There is nothing inherent in Gerber's labels that would support an inferential leap from factually correct nutritional statements to deceptive claims about product quality. This is especially so because both Gerber's and its competitors' labels included detailed information about their ingredients and nutritional contents. Indeed, Bruton admitted that she actually reviewed the nutritional facts of both Gerber's products and its competitors, and thus she would presumably have seen that they were nutritionally similar despite whatever additional nutritional labeling Gerber's products had. How those additional, accurate label statements are inherently deceptive is far from self-evident, as it was in *Colgan*. And I do not believe that there is any evidence to support the majority's notion, Maj. at 4–5, that the challenged statements make Gerber's labels objectively more "attractive" to a "a significant portion of the general consuming public," *Ebner*, 838 F.3d at 965, or that such a portion of consumers would conclude that any price or quality difference between Gerber and its competitors is due specifically to the challenged label statements (as opposed to any number of other reasons that may have led Gerber's nationally recognized brand to carry more market power).

Accordingly, I agree with the district court that this body of evidence—Bruton's testimony, the FDA's warning letters, and the product labels themselves—is not enough to create a genuine dispute of material fact as to the likelihood of general consumer deception about the quality of Gerber's products. I would affirm the grant of summary judgment on these claims, and I respectfully dissent from the majority's judgment to the contrary.